

Copyright Law, Fair Use and Social Media

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Recent and Anticipated Changes to Copyright Law

Fourth Estate Public Benefit Corp v. Wall-Street.com LLC (586 U.S. __ (2019))

- Copyright Act requires that a work must be “registered” before a lawsuit can be filed
- Some circuits said “registered” means paperwork has been filed
- Other circuits said Copyright Office needs to act on an application to be “registered”
- **Ruling:** The Copyright Office needs to act first.

Rimini Street, Inc. v. Oracle USA, Inc. (586 U.S. __ (2019))

Rimini Street provided third-party support for Oracle's enterprise software

Rimini Street used Oracle software updates without a license

Oracle sued and won a jury verdict for \$125 million, including \$12.7 million in taxable costs

Dispute over what "full costs" means

Ruling: "Full costs" means the "quantity or amount;" not the scope of costs.

Georgia et al v. Public.Resource.Org, Inc. (Pending – certiorari granted)

- Public.Resource is an activist group that published an annotated version of Georgia’s state code without permission
- Georgia makes a simple version of that code free to public
- Georgia also hires a private firm to make a more detailed version available for a fee
- 11th Circuit threw out Georgia’s lawsuit – “a work of the people”
- Public Resource filed certiorari
- Oral argument is scheduled for the fall of 2019

Allen v. Cooper

(Pending – certiorari granted)

- Videographer Frederick Allen took photographs and video of Blackbeard's shipwreck Queen Anne's Revenge
- North Carolina published Allen's works on one of its websites without permission
- North Carolina's claim of sovereign immunity was rejected by trial court
- Fourth Circuit reversed and found immunity
- Allen has appealed and certiorari was granted
- Oral argument is scheduled for the fall of 2019

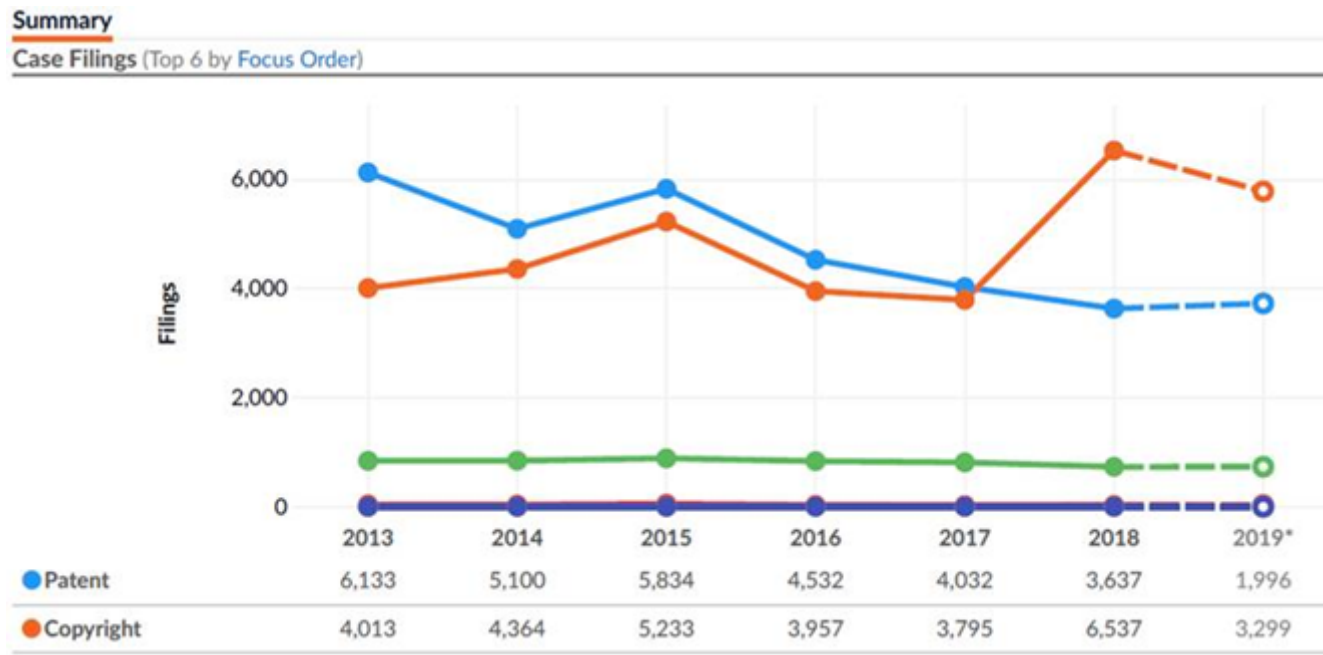
Google v. Oracle

- Oracle developed and copyrighted its JAVA API
- API stands for Application Programming Interface and is critical in writing some forms of software code
- Google used Oracle's APIs extensively in developing its Android platform
- Oracle sued in 2010, seeking billions of dollars in damages
- Lawsuit has gone up to U.S. Supreme Court twice and cert is pending
- Issues: Are Oracle's APIs copyrightable?


Was Google's use protected by "fair use" doctrine?

The Rise of Copyright Litigation

Patent and Copyright Filings Since 2013



Why are companies pivoting to copyright litigation?

- Leahy-Smith America Invents Act of 2011
- Alice Corp. v. CLS Bank International (2014)
- Associated costs  filing and enforcement
- Increase in videos on internet has increased value of copyright

Copyright Litigation Considerations

- Timing
- Venue
- Damages
- Defenses

FAIR USE

Why Train Your Clients on Fair Use?

- Avoid payouts...often much higher than license fees.
- Avoid relationship problems with photographers and other media outlets.
- Avoid negative PR.

.@HuffPostPol NOT COOL. You stole my picture from Instagram.

Fair Use

- Law recognizes that in limited situations, license shouldn't be required.

IS THE NEW USE TRANSFORMATIVE?

- Whether the new work merely supersedes the original, “or instead adds something new, with a further purpose or different character” altering the original work “with new expression, meaning or message”?

E.g., Reporting a story the work played a part in, commenting on the work, parodying or making fun of the original work.

Fair Use

- Context of use determines the amount of risk involved.
- Even if purpose is transformative, still can't use too much. Shouldn't substitute for people viewing the original.
- For video, use small portion, and only what you need to make the new point. No set number of seconds always OK.
- Stay away from commercial/promotional uses.
- May still need to take down upon complaint.
- May still need to pay out license fees for use.
- When in doubt, ask permission – likely less expensive.

ENTERTAINMENT 06/23/2017 10:08 am ET

Jennifer Lopez Hits Back At Haters Who Accused Her Of Photoshopping Ab Photo

#LordBlessTheHaters.

Jennifer Lopez clapped back at the haters who accused her of Photoshopping one of her most recent Instagram photos.

On Thursday, the performer shared the photo below:





YFi AM

Yahoo Finance's morning chat show where a rotating cast of our experts weigh in on the top business news headlines and some of the stories that are driving the most "buzz." Live at 10:00am ET.



world_record_egg • Follow

world_record_egg Let's set a world record together and get the most liked post on Instagram. Beating the current world record held by Kylie Jenner (18 million)! We got this 🥚

#LikeTheEgg #EggSoldiers #EggGang

Load more comments

tibrilliant Пепеши nosauce neryx
jackfweishaar Egg
real_human.mp4 @jhanonnn
@asking_for_likes police
nastysaron @instagram Plz verify our babe
world_record_white_colored_egg STOP EGG
RACISM! 🤝

28,569,996 likes

JANUARY 4

Log in to like or comment.

WORLD RECORD EGG

-0.50%  -119.45
▼ DJI 23,876.50

YAHOO! FINANCE

EGG BREAKS RECORD FOR MOST-LIKED INSTAGRAM POST



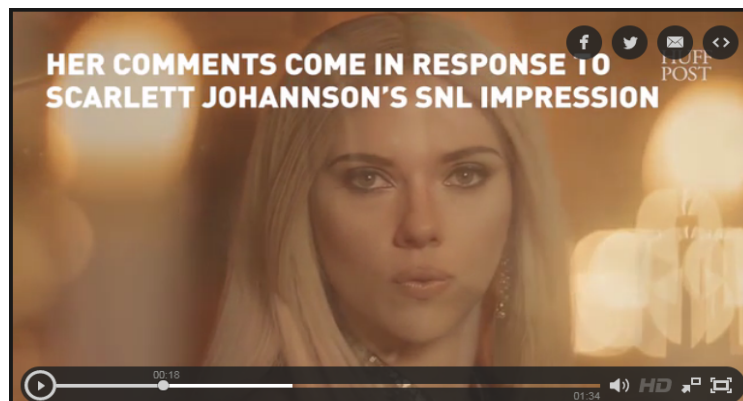
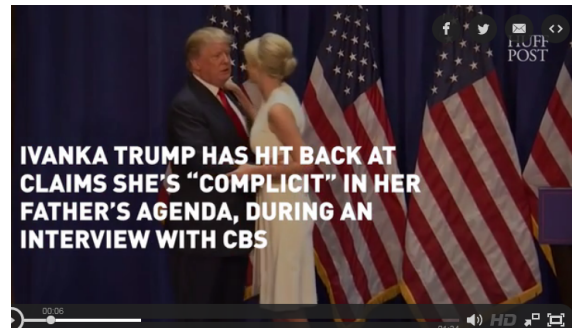


NOW PLAYING

Ivanka Trump Claims She Doesn't Know What 'Complicit' Means

During an interview with CBS News, the first daughter hit back at claims that she's "complicit" in her father's agenda, which has already rolled back reproductive rights and removed parental leave and sexual harassment protections. In fact, she claimed she doesn't even know what the term "complicit" means.

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Erin Brockovich blasts Trump over 'reckless, careless' environmental regulation rollbacks



Privileged and Confidential

Likely Not Transformative

- Just playing a clip because it is entertaining.
- Straight news reporting of news event recorded in video or photograph.
- Just using a photo of a celebrity in a story about that celebrity.

Court Rejects Gossip Site's Fair Use Defense—Barcroft v. Coed Media

November 9, 2017 · by Venkat Balasubramani · in Copyright, Licensing/Contracts

Privileged and Confidential



HOME IS WHERE THE HEART IS



News

Viral Photo of Wedding-Crashing Trump Is Not Fair Use for Hearst (1)

Posted Dec. 11, 2018, 3:29 PM



Court:

“Hearst used the Photograph for the same reason Otto took the Photograph: to depict a memorable event – the President’s presence at a private wedding.”

“If so amateur photographers would be discouraged from creating works and there would be no incentive for publishers to create their own content to illustrate articles: why pay to create or license photographs if all personal images posted on social media are free grist for use by media companies, as Hearst argues here?”

... antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information, much of which can be gleaned from the photograph itself.”

Otto v. Hearst (S.D.N.Y. 2018)

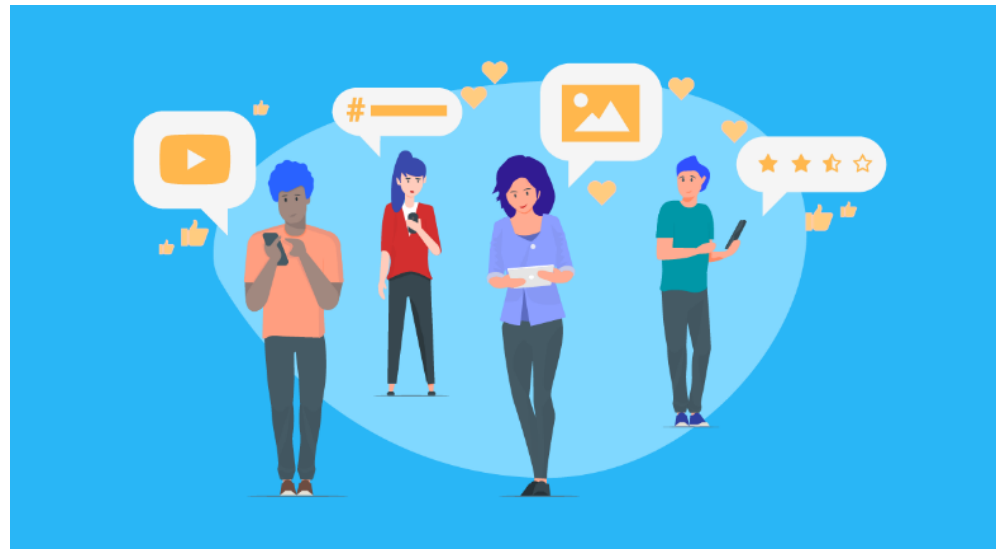
Privileged and Confidential

User-Generated Content

What is User Generated Content/UGC?

Publicly-viewable content produced by a user of a website/app rather than by the business behind that website/app.

- Text
- Images
- Posts
- Blogs
- Reviews
- Comments
- Videos
- Audio



Pros and Cons of UGC?

PROS

Customer engagement

Free advertisement

Free ideas/suggestions

Builds brand awareness

Improves search engine ranking

CONS

Many potential legal pitfalls and risks

UGC – Ownership Issues

Just because someone tags your company in an image, it doesn't mean that you have approval to use that image for marketing or commercial purposes.

Generally the photographer has ownership rights (copyrights) in the photo

HOWEVER, additional permission is needed IF:

UGC – Ownership Issues (continued)

Image includes other people

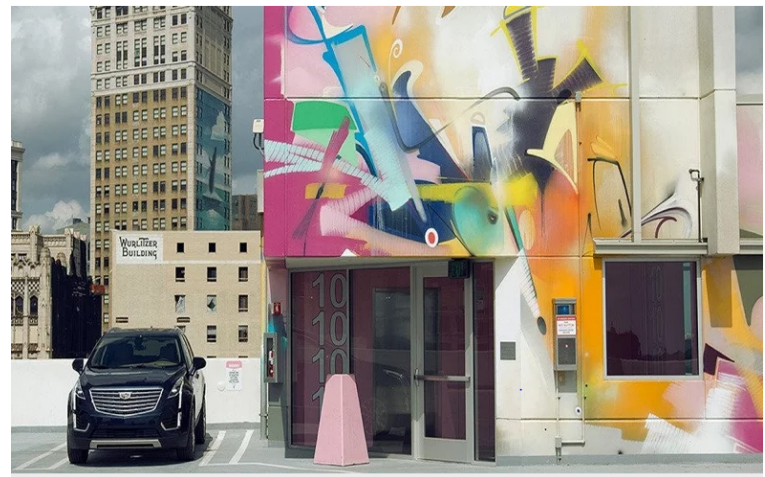
Triggering right of publicity and privacy rights



UGC – Ownership Issues

Image includes third-party copyrights

Adrian Falkner vs. General Motors



7.7 You agree that Content you submit to the Service will not contain any third party copyright material, or material that is subject to other third party proprietary rights (including rights of privacy or rights of publicity), unless you have a formal licence or permission from the rightful owner, or are otherwise legally entitled, to post the material in question and to grant YouTube the licence referred to in paragraph 8.1 below.

UGC – Ownership Issues

Image includes third-party trademarks



UGC – Passive Consent

Relying on the Terms of Service of social media platforms

- The Terms generally give the platform broad permission to share and display content that's posted on *their* platforms, **but unlikely to offer protection against 3rd party claims** (see *AFP v. Morel*, 10 Civ. 02730 (AJN) (S.D.N.Y. Jan. 14, 2013))



: allows company using Twitter's API to identify and access tweets and grants that company a license to "copy a reasonable amount of and display" the tweets through company's own services.

: the user grants Twitter "a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt modify, publish transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)."



: the user grants Instagram "a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings)."

UGC – Passive Consent (continued)

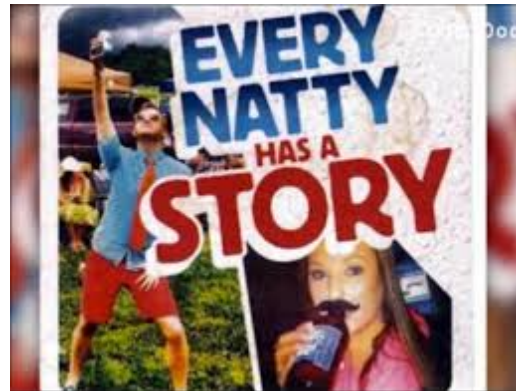
Solely obtaining photo credit

Assuming participation in contest or sweepstakes is consent

Creating brand hashtag and encouraging consumers to use it

Still BEST practice to get explicit consent! WHY?

Kayla Kraft vs. Anheuser-Busch (“Natty Ice” lawsuit)

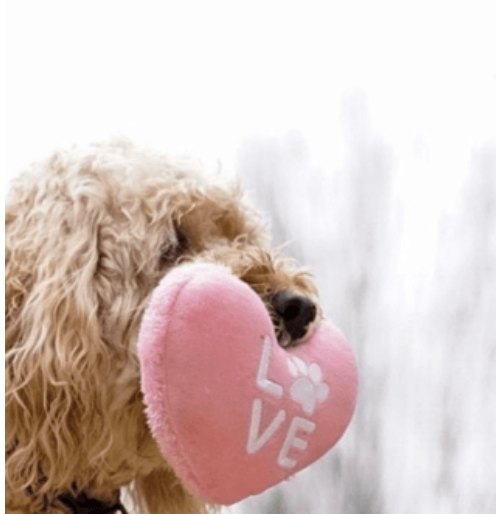


UGC – Express Consent

Remember most people are happy to allow companies to use / repost their content!



UGC – Express Consent



rundashie

Follow

rundashie L🐾VE
#goldendoodlesofinstagram
#doodlesofinstagram #dailydog
#dogsofinstagram #sonyalpha #sonyimages
#sonyphotography #sonylenses50f18

_winniethedoodle Love!

petsmart Hi @rundashie, such a cute photo! We'd love to share it on our accounts. Do we have your permission to share it on our social channels? We will give you credit in the caption. If this is ok, please reply #YesPetSmart

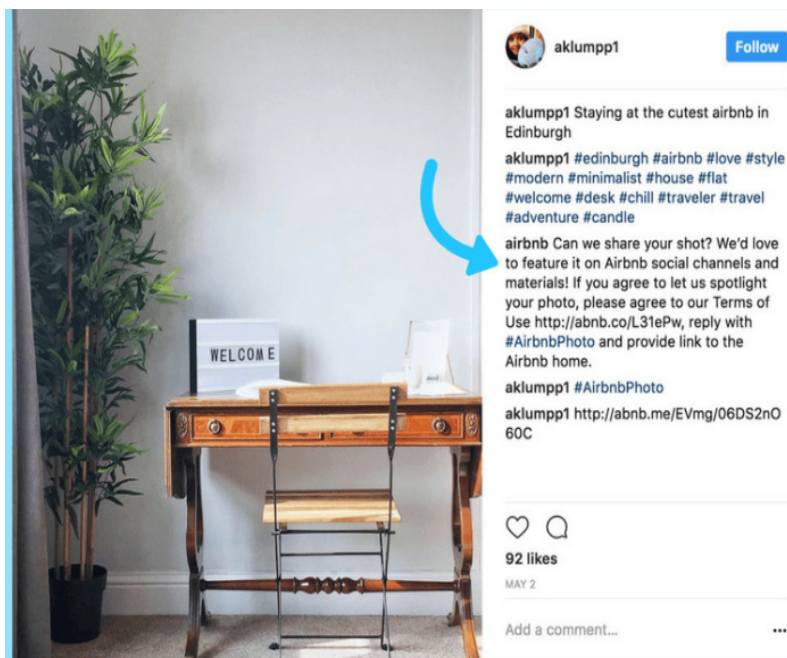
rundashie @petsmart #YesPetSmart

PetSmart

Request express consent of photographer and anyone in photo

Give photo credit in any repost

UGC – Express Consent



Airbnb

- Obtain express consent
- Confirm acceptance of company's Terms of Use
- Explain how company plans to use the UGC
- Give photo credit in any repost

UGC Tips

Create clear policy and guidelines for UGC

- Include in Terms of Service
 - Permitted and prohibited uses
 - Express License grants
 - Indemnification
 - Ownership of derivative works
 - Take-downs and reporting infringement
 - DMCA compliance
- Create clear internal policy and guidelines for your employees
- Carefully review social media platforms' terms regarding UGC

UGC Tips (continued)

- Consider investing in Digital/Advanced Rights Management (DRM or ARM) tools & software if you rely heavily on UGC
- Consider hiring someone to exclusively handle UGC
- Evaluate use of UGC against potential risks (hijacking)
- Be clear with UGC owners as to how you plan to use their UGC – never monetize without express consent!



Social Media Policies

Social Media Policies

What is a social media policy?

- Helps employees participate responsibly online (whether or not in the workplace and whether or not using their employer's technology resources) and helps their employer maintain its reputation
- Typically resides in an employee handbook
 - Right after the section on appropriate use of the employer's technology

Social Media Policies

What is a social media policy?

- Addresses both the potential distraction of social media; and
- Provides guidance for employees relating to posts about their employer
- For Example:
 - Defending their employer from online “haters”; or
 - Disclosing confidential information
 - (Conveniently ignoring First Amendment issues in this presentation)

Social Media Policies

Two questions to ask

- Question No. 1. Do you have a social media policy, and if not, should you?
- Question No. 2. If you have a social media policy, is it enforceable?

Social Media Policies

Question No. 1. Do you have a social media policy, and if not, should you?

- Lets employees know what is and isn't acceptable
- Helps prevent damage to a company's reputation
- Assists in branding
- Protects confidential and sensitive information

Social Media Policies

Question No. 2. If you have a social media policy, is it enforceable?

- National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.
- Bad example: employees “may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”
 - → “Company information” must be well defined. It should not prohibit discussion of wages, discipline, performance ratings, or other working conditions

Social Media Policies

Question No. 2. If you have a social media policy, is it enforceable?

- Best practices:
 - Should be specific and easily understood by employees
 - Free speech implications
 - Can't hide employees
 - Limits to management's power
 - Logos may not be totally under company control